What Industry Are You In?

- Sales
- Manufacturing
- Retail
- Service
- Food or Hotel
- Construction (including Architectural or Engineering)
- Health Care
- Professional
- Government

How Many Employees Are Employed By Your Company?

- 1-14
- 15-49
- 50-99
- 100-299
- 300-500
- 501-1000
- 1001+
Is Your Company:

- Union
- Non-Union
- Mixed

Have Any Employees Requested A Reasonable Accommodation?

- 1. Yes
- 2. No

Two Statutes Apply Coverage

- Americans With Disabilities Act (ADA) – 15 or more employees
- Michigan Persons With Disabilities Civil Rights Act (PWDCRA) – 1 or more employees (MCLA 37.1201(b))
- Employers obligated to follow statute which gives more rights to employee
ADA Amendment Act (effective 1/1/09)

- Broadening the definition of disability has expanded coverage. Includes employees with episodic or intermittent disabilities (e.g., epilepsy, diabetes, multiple sclerosis, cancer)
- Temporary impairments limited to six months.
- Mitigating measures, such as medicine and aids, are no longer considered in determining if an employee is disabled under the ADA.
- Eye glasses still a mitigating measure.

ADA Amendment Act (con't)

- Coverage under the ADA includes employees perceived as having a physical or mental impairment.
- Employee alleging discrimination no longer needs to prove that they have a qualified disability. Instead, employee must show that they are discriminated against based on a disability.
- Employer cannot use qualification standards or selection criteria based on an individual’s uncorrected vision unless the standard is job-related and a business necessity.

Basic ADA Equation

If QID then IP and RA Unless UH or DT
Who is Protected by the ADA?

- Qualified Individual with a Disability (QID)
- Person with a record of disability
- Person regarded as having a disability
- Person associated with a disabled individual

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Quick Refresher On Qualified Individual With a Disability (QID)

- Individual with a physical or mental impairment
- Who, with or without reasonable accommodation
- Can perform essential functions of job (fundamental job duties)
- No obligation to perform non-essential functions
- Employers have the right to apply the same performance and conduct standards to all employees, including those with disabilities

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Determining Essential Functions

- Fundamental job duties
- Job function is essential is removal would “fundamentally alter” the position
- The employer has the burden of proving that a challenged job criterion is an essential function.”

Marjian v. Southwest Ohio Regional Transit Authority, 385 Fed. Appx. 472, 476 (6th Cir. 2010)
Determining Essential Functions (non-exhaustive list)

- The employer’s judgment of which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent performing the function;
- The consequences of not requiring the employee to perform the function;
- The work experience of past employees in the job; and
- The current work experience of employees in similar jobs.

What Is An “Accommodation”

- Any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions.
- Adjustments to ensure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.
- Employee must request an accommodation.

Reasonable Accommodation

If No Undue Hardship

- Apply performance and conduct standards
- Accommodation conditions
  - Must be effective
  - Need only to reduce barriers
  - Need not be best accommodation
  - Not necessary if primarily for personal use (eyeglasses, wheelchair, artificial limb)
  - No undue hardship
  - No direct threat
Undue Hardship- Significant Difficulty Or Expense Incurred By The Employer

- Nature and net cost of the accommodation needed (consider availability of tax credits and deductions, and/or outside funding)
- Overall financial resources of facility and the employer including the number and type of facilities of employer
- Number of persons employed at the facility
- Effect of the accommodation on expenses and resources
- Type of operation including composition, structure, workforce, and geographic and financial relationship with other facilities
- Impact on the operation of the facility

Determination of the Presence of A Direct Threat

- Significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation
- Determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job
- Direct threat analysis not required when threats are made

Determining The Presence of A Direct Threat

- Assessment based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence
- Factors for direct threat determination include:
  - Duration of the risk;
  - Nature and severity of the potential harm;
  - Likelihood that the potential harm will occur; and
  - Imminence of the potential harm
The Interactive Process (IP)

- It may be necessary for the employer to initiate an informal, interactive process with the employee to determine the appropriate reasonable accommodation for an employee.
- Purpose to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."
- IP requires communication and good faith exploration of possible accommodations.
- IP is mandatory, and both parties have a duty to participate in good faith.
- Party who obstructs the process or otherwise fails to participate in good faith will be sanctioned.

Kleiber v. Honda of American Mfg., 485 F.3d 862, 868 (6th Cir. 2007)

Interactive Process (IP) con’t

- Employee has the burden of proposing an initial accommodation, and the employer has the burden of showing how the accommodation would cause an undue hardship.
- Employer is not required to propose a counter accommodation in order to participate in the interactive process in good faith (not all judges agree).
- Taking the extra step of proposing counter accommodations may be additional evidence of employer good faith.
- If an employer takes that step and offers a reasonable counter accommodation, the employee cannot demand a different accommodation.

Jabukowski v. The Christ Hospital, Inc., 627 F.3d 109 (6th Cir. 2010)

Overtime Restrictions

- If overtime is essential element of job, no obligation to reduce or eliminate
- No obligation to create overtime work for employee being provided reduced duties as reasonable accommodation
- If overtime not essential element, cannot require overtime

Bath v. Cook County, 241 F.3d 919 (7th Cir. 2001)
Standing Restrictions

- Sitting or use of stool which does not interfere with production requirements can be RA
- Wal-Mart greeter could use sit-to-stand wheelchair, high stool with armrests, or electronic scooter
- Co-worker complaints of favored treatment irrelevant

Attendance Requirements

- Inability to attend work (or be on call) can “fundamentally alter” a position which requires attendance to perform tasks
- Employee who cannot meet attendance requirements of job cannot be QID
- Cannot treat QID attendance more harshly than other employees
- But some courts have held that strict punctuality as an essential element is a jury question

Lifting Restrictions

- Some courts hold employee with lifting restrictions is not QID – no accommodation
- Some courts hold employee with lifting restrictions is QID – accommodation
- Check status of law if confronted with lifting restriction
Transfers As Reasonable Accommodations

- Employer duty to consider transferring QID to a vacant position within the organization for which the employee is otherwise qualified
- No duty to create new job
- No duty to displace existing employee to accommodate QID
- Employer has duty to locate suitable positions for QID
- Pay rate at new job
- No obligation to transfer away from individuals or climate
- UNLESS organization has more beneficial policy which it must follow

Leave of Absence As Reasonable Accommodation

- FMLA – 12 weeks of leave
- If have policy or practice on leaves of absence must follow it
- Unpaid leave of absence may be reasonable accommodation
- Courts have held leaves of absence of 9 months or longer to be reasonable – Avoid the FMLA trap
- When can the employee return

Light Duty Options

- Legal obligation – return employee to work when can perform essential duties of job with or without reasonable accommodation
- No ADA duty to have light duty
- May utilize temporary light duty
- May create light duty positions for occupationally injured
- May not reserve light duty positions for occupational injuries
- Act on non-discriminatory basis
- Beware of Pregnancy Protection Act claim
### Some Possible Accommodations

- Access barrier removal;
- Job restructuring: combining jobs;
- Modified work schedules;
- Changing breaks;
- Flexible leave policies;
- Reassignment to a vacant position;
- Acquisition of equipment or devices; readers; or interpreters;
- Adjusting and modifying exams, training materials, and policies.

### When In Doubt On An Accommodation, Call JAN

- **Job Accommodation Network (JAN)**
- JAN provides information on accommodations for all types of impairments, including sensory, motor, cognitive, and psychiatric conditions. Information
- (800)526-7234 (Voice)

### Sample JAN Accommodation Ideas for One Hand Use

- **Driving:** [Steering wheel balls and spinner knobs](#) can assist with grasping a steering wheel.
- **Working with Tools:** [Tool balancers](#), tool holders, and [ergonomic/pneumatic tools](#) are useful for individuals who have gripping limitations.
- **Lifting Materials, Products, and People:** [Compact lifting devices](#), vacuum material handling, and winches are useful for moving materials and products. For transferring and moving people, [patient lifts](#) are helpful.
Claim of Full Disability May Not Preclude RA

- Disability claim in one forum may not negate need for reasonable accommodation
- Application for SSDI or workers compensation benefits may not be inconsistent with ADA for failure to accommodate
- Individualized assessment of all situations


Medical Exams: Job-related And Consistent With Business Necessity

Limited rights to medical exams:
- Post offer (if everyone in classification)
- When an employee claims disability
- Examination necessary for reasonable accommodation
- Medical examination, screening and monitoring required by other laws
- Voluntary “wellness” and health screening programs

Confidentiality Obligations

- Supervisors and managers as necessary – need to know
- May not explain to other employees why any resulting change is being made.
- Separate forms/file in locked cabinet – limited access
- First aid safety personnel as necessary
- State workers’ compensation offices
- GINA – new information restrictions
- Common law privacy rights: intrusion upon another’s seclusion or solitude, or private affairs, public disclosure of embarrassing private facts, false light
- Obligations even if employee not disabled
EEOC Rules on Genetic Information
Non-Discrimination Act ("GINA")

- GINA prohibits discrimination on the basis of genetic information about the individual and family members
- Applies to employers with 15 or more employees
- Applies to applicants for employment and current and former employees
- Special rules for wellness programs
- Safe harbor notice to avoid providing genetic information which would include family health history
- No violation where genetic information inadvertently obtained

Special Michigan Reasonable Accommodation Rules

- Cost of RA and readers limited by size of employer (reduced by 50% for temps)
- No duty to transfer employee
- Where less than 15 employees, not required to restructure a job or alter the schedule of employees
- Job restructuring and altering the schedule of employees applies only to minor or infrequent duties relating to the particular job held by the person with a disability
- If proper notice to employees, claims for RA must be made within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed
- Cost limits do not apply to public employers and 501(c)(3)s

Michigan Minimum Reasonable Accommodation Amounts For Equipment or Devices

If the cost of the accommodation does not exceed the following amounts, the accommodation does not impose an undue hardship

- 1-3 employees – $823.35 (SAWW)
- 5-14 employees - $1235.03 (1.5xSAWW)
- 15-24 employees - $1646.70 $823.35 (2xSAWW)
- 25 employees and more - $2058.38 (2.5xSAWW)
- Additional costs for readers and interpreters
Drugs & Alcohol Rules in the Workplace

- Exclusion of any person currently engaging in illegal use of drugs
- Protection of rehabilitated drug users who are no longer using illegal drugs
- Rules, regulations, policies, procedures to make sure rehabilitated drug users are no longer using illegal drugs
- Application of uniform qualification, performance, and behavior standards to be applied to drug users and alcoholics
- Medical marijuana is not a reasonable accommodation under ADA, but what about MPDCRA?

Michigan Medical Marijuana Rules

- What is needed
  - Dr.’s statement that the employee “is likely to receive...benefit from their medical use of marijuana to treat or alleviate...debilitating medical condition or symptoms” and check
- Easy Access - Low threshold
  - Debilitating medical condition includes any “medical condition or its treatment that produces...severe and chronic pain...severe nausea...severe and persistent muscle spasms.
- Free from discipline
  - Employee and primary caregiver can grow and use marijuana and are free from any “prosecution...civil penalty or disciplinary action...”

Few Restrictions on Medical Marijuana Use

- No more than 2.5 ounces and 12 plants
- No sale to non-cardholders
- No possession on school grounds or bus
- No use on public transportation, in public place, or in jail
- No operating motor vehicle, aircraft, motorboat
- No employer obligation to accommodate use in workplace or working under influence
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